FILE COPY

Office – Supreme Court, U. S.
FILED
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1944

No. 161

NATIONAL METROPOLITAN BANK, a corporation,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, AND BRIEF IN SUPPORT THEREOF.

GEORGE C. GERTMAN,
American Security Building,
Washington, D. C.

Attorney for Petitioner.

WILSON PRINTING CO., WASHINGTON, D. C. – BRANCH P. EPES, MANAGER

INDEX

	Page
Statement of Matter Involved	1
Jurisdiction	6
Questions Presented	6
Reasons for Allowance of Writ	7
Brief	9
Appendix to Brief	17

CASES CITED

Atlantic Coast Line v. Florida, 295 U. S. 301	18
Bank of United States v. Bank of Georgia, 10 Wheat. 333	22
Central National Bank v. National Metropolitan Bank, 31 App. D. C. 391	14, 15, 16
Clearfield Trust Co. v. United States, 318 U. S. 363	12, 13, 15, 17, 19
Continental National Bank v. National Bank of Commonwealth, 50 N. Y. 575	17
Cooke & Co. v. United States, 91 U. S. 389	21
County of Oneida v. First Citizens Bank, 35 N. Y. Supp. (2d) 785	12
Eliason v. Wilborn, 281 U. S. 457	14
Erickson v. Iowa National Bank, 211 Iowa 495, 230 N. W. 342	18
Holly v. Missionary Society, 180 U. S. 284	14
International Finance Corp. v. Peoples Bank, 27 F. (2d) 523, affirmed 30 F. (2d) 46	18

CASES CITED (Continued)

Page

Ladd & Tilton Bank v. United States,
30 F. (2d) 334 ..... 7, 14

Leather Mfgrs. Bank v. Merchants Bank,
128 U. S. 26 ..... 14, 15

Leather Mfgrs. Bank v. Morgan, 117 U. S. 96 ..... 14, 17

Lewis v. United States, 279 U. S. at p.73 17

National Bank v. Seattle National Bank,
109 Wash. 312, 187 P. 342 16

Philadelphia National Bank v. Fulton
National Bank, 25 F. (2d) 995 14

Public Bank of New York v. Burchard,
135 Minn. 171, 160 N. W. 667 22

Sanborn v. United States, 135 U. S. 271, 281 6

State Planters Bank & Trust Co. v. Fifth-Third
Union Trust Co., 56 Ohio App. 309,
10 N. E. (2d) 935 22

Stone v. White, 301 U. S. 532 ..... 13, 18

United States v. Bank of America,
47 F. Supp. 279, 281 14

United States v. Chase National Bank,
252 U. S. 485 ..... 7, 9, 18, 20

United States v. First National Bank of
Chicago, 138 F. (2d) 681 ..... 7, 11, 14, 18, 20

United States v. Guaranty Trust Co.,
293 U. S. 340 ..... 14, 19, 22

United States v. National Exchange Bank,
45 F. 163 22

CASES CITED (Continued)

Page

United States v. National Exchange Bank of Baltimore, 1 F. (2d) 888, affirmed 270 U. S. 527 22

United States v. National Exchange Bank of Providence, 214 U. S. 302 ..... 13, 15, 20

United States v. National Rockland Bank, 35 F. Supp. 912 21

United States v. Citizens' Union National Bank, 40 F. Supp. 609 22

Washington Loan & Trust Co. v. United States, 77 U. S. App. D. C. 284, 134 F. (2d) 59 ..... 5, 12, 13, 19

Wells Fargo & Co. v. United States, 45 F. 337 22

STATUTES CITED

District of Columbia Code (1940), Vol. 2, ss.28-124 ..... 6, 13, 22

District of Columbia Code (1940), Vol. 2, s.28-201 ..... 14, 22

District of Columbia Code (1940), Vol. 2, ss.28-201-501-502 2

United States Code Annotated, Vol. 31, s.492 17

United States Code Annotated, Vol. 31, s.82 2

MISCELLANEOUS

Comptroller of Treasury Opinions, Vol. 20, p.859 2

Harvard Law Review, Vol. 34, p.304 19

Keener on Quasi Contracts (1893), p.67 14

Pomeroy's Equity Jurisprudence (1905), Vol 2, s.804, p.1421 14

IN THE

Supreme Court of the United States

October Term, 1944

No.....

NATIONAL METROPOLITAN BANK, a corporation,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

STATEMENT OF THE MATTER INVOLVED

During 2 1/3 years beginning July 13, 1936 and ending November 16, 1938, the United States, through its Paymaster of the United States Marine Corps Headquarters, Washington, D. C., validated and issued 144 Treasury checks totalling $18,060.83 drawn payable to the order of 16 marine officers stationed at that Headquarters. These checks were normal in appearance, bore the seal of the United States and had stated on them the object for which they were issued, namely, "pay" or "mileage." They

inherently carried the Government's warranty of authenticity and their issuance for value; also its engagement, as primary obligor, to pay them upon presentment. D. C. Code (1940), Vol. 2, ss. 28-201-501-502.

Yet after all of them had run their course as normal Treasury checks and were redeemed at the Treasury as such, the General Accounting Office discovered that James H. Berry, Junior, was not entitled to check A-121 for $162.90 listed in Schedule B (R. 3-7). Having his attention directed to this, the Paymaster ordered his administrative board to make an investigation of the activities of James H. Foley, a civil service clerk, CAF-4 (R. 4). Upon learning this, Foley went to New York where he killed himself on November 22, 1938 (R. 10).

Within fifteen days after the investigation was ordered, *and from evidence in the Paymaster's files* (R. 16), the administrative board found that no money was owing the payees, that no payee ever saw, endorsed or received the checks, that the checks were supported by "travel or mileage orders which Foley forged," and that Foley had presented the checks to the disbursing officers "who signed them without verifying the vouchers and documents which supported them" (R. 10). This was in violation of an Act of Congress, 31 U. S. C. A., s.82. See Opinions of Comptroller of Treasury, Vol. 20, p.859.

The investigation also revealed that Foley had fraudulently procured the checks to be validated and issued, and upon gaining their possession he forged the professed payees' names, endorsed them himself, and then cashed or deposited them to his credit at The Anacostia Bank where he had maintained an account for twelve years (R. 11-15).

Whereupon the Secretary of the Navy convened a Board of Inquiry for the purpose of "inquiring into the circumstances and the general activities of James H. Foley

who defrauded the United States of $18,060.83 and the circumstances which made the execution of such fraud possible" (R. 10). The findings of the Board have not been made public (R. 11).

The following pleaded facts stand admitted by the Government:

(a) "* * * that plaintiff owes the public the duty to issue only legitimate checks to legitimate creditors of the Government and that if it issues fictitious checks, warranting them to be genuine, equity and fair play require that it should bear the loss." (R. 14)

(b) "* * * the administrative section of the United States Marine Corps * * * was specifically charged with the duty of preauditing, examining and checking all accounts and claims against the United States arising in the Marine Corps." (R. 15).

(c) "Owing to the confidence reposed in Foley by the * * * administrative section of the Marine Corps, and owing to their neglect of duty in failing to check or supervise his work, Foley, on 144 occasions between July 1936 and November 1938 successfully defrauded the United States by obtaining money unlawfully." (R. 14)

(d) "The disbursing officers and paymasters who signed and validated the checks were specifically charged by law with the duty, before disbursing public funds, of ascertaining whether the United States actually was indebted to the payees of the checks in the amount called for and the object typed thereon. But the disbursing officers and paymasters neglected their duty in this regard." (R. 16)

(e) "Foley's fraud was not detected earlier because no supervision was exercised over his work and no preaudit or postaudit of the documents and vouchers supporting the checks was made, though if made the fraud or deceit would have been instantly exposed, as it was

two years afterwards when the records and accounts were examined and audited." (R. 21)

(f) "Plaintiff knew from its record and accounts, if they had been examined beforehand, that it was not indebted to the payees of the checks in the amount or for the object typed thereon or for any other object." (R. 16)

(g) "The Anacostia Bank, which had cashed the checks for Foley, endorsed each check and transmitted it to the defendant for collection to its account." (R. 11)

(h) "Relying upon the plaintiff's aforesaid warranty of their genuineness, and believing that they bore the genuine signatures of the payees, defendant, as the checks were received by it from The Anacostia Bank, placed the following printed endorsement on the back of each check: 'Pay to the order of any Bank, Banker or Trust Co. Prior endorsements guaranteed. National Metropolitan Bank, Washington, D. C.' " (R. 12)

(i) "Relying upon the plaintiff's warranty of the genuineness of the checks and believing them to bear the genuine signatures of the endorsers, and in ignorance of their forgery and of their being bogus in their inception, defendant, as each check was received by it for collection, as aforesaid, presented it to the Treasurer of the United States for payment and redemption and upon collecting the proceeds placed the same upon its books to the credit of The Anacostia Bank, Anacostia, D. C.—the cashing Bank—and thereafter, in the regular course of business, and before discovery of the forgeries, defendant paid over the proceeds of said checks to said Anacostia Bank. Defendant never received nor did it exact any compensation or profit for its services in that behalf and throughout its dealings with the plaintiff in connection with said checks it acted in the utmost good faith." (R. 13)

(j) "No bad faith or negligence, traceable to defendant

—the collecting Bank—contributed to the payment of the checks or their forgery." (R. 18)

(k) "The forgery of the checks deprived nobody of title, as would be the case if the checks had been genuine and normal." (R. 18)

(l) "The checks were not owned by anybody, i. e. nobody had title to any of them." (R. 18)

(m) The United States "invited and facilitated the forgeries." (R. 18)

(n) "Defendant says that the initial misrepresentation of the Government that these checks were genuine in all respects lulled it into a sense of false security; that if the representations of the Government to the public that the checks were genuine in all respects had been true, the checks would have reached the payees' hands in the regular course of business and there would have been no forgeries and no loss." (R. 19)

On August 11, 1942 the present action was filed (R. 1). But the filing date was six years after the first check was paid by the Treasury and nearly four years after the discovery of the falsity of the checks and the forgeries. The complaint charges no negligence or bad faith against petitioner. Petitioner filed comprehensive answers (R. 8-22) and demanded trial by jury (R. 20).

On March 22, 1943 the Government moved for summary judgment on the pleadings (R. 22). The motion was predicated on *Washington Loan & Trust Co.* v. *United States*, 77 U. S. App. D. C. 284, 134 F. (2d) 59. On June 9, 1943 the District Court, without making any findings of fact, conclusions of law, or announcing any opinion, entered judgment (R. 23) against petitioner for $18,060.83 with 6 per cent interest (about $4,000.) from the filing date, though interest was asked on each check from the date

of payment. (See *Sanborn* v. *United States*, 135 U. S. 271, 281). On May 1, 1944, upon appeal by petitioner (R. 25), the United States Court of Appeals for the District of Columbia affirmed the judgment of the District Court (R. 34) pursuant to its opinion (R. 30-33).

JURISDICTION

This Court has jurisdiction to issue the writ applied for under Sec. 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936, at p. 938. The United States Court of Appeals for the District of Columbia had jurisdiction under Sec. 26, Title 18, 1929 D. C. Code, and the District Court had jurisdiction under Sec. 44 of the same Title.

QUESTIONS PRESENTED

1. Where false and fraudulent checks, issued by the United States as *genuine* ones, fall into the hands of an intermediate bank bearing forged payees' endorsements, is that bank liable for the inevitable resulting loss because it warranted the genuineness of the endorsement in reliance upon the avowed integrity of the checks, and in the belief that they had a rightful owner who had endorsed; it appearing that the intermediate bank upon collecting the checks forwarded the proceeds to the cashing bank in ignorance of their falsity and before discovery of the forgeries, that it acted in good faith, was not enriched, was not negligent and never dealt with the forger?

2. Assuming the foregoing facts, is not the United States, estopped generally, and particularly under the Uniform Negotiable Instrument Law, 1940 D. C. Code, Vol. 2, s.28-124, to set up the forgeries?

3. Assuming the foregoing facts, is not the United States barred by laches where it delays filing of suit against the collecting bank until after that bank has lost, by limitations, all right of recourse against the cashing bank, its prior endorser?

REASONS RELIED ON FOR ALLOWANCE OF WRIT OF CERTIORARI

1. The United States Court of Appeals for the District of Columbia has decided a federal question of general importance which has not been but should be settled by this Court.

2. The decision of the United States Court of Appeals for the District of Columbia is in conflict with an applicable decision of this Court, namely, *United States* v. *Chase National Bank*, 252 U. S. 485.

3. The decision of the United States Court of Appeals for the District of Columbia is in conflict with two applicable decisions of Courts of coordinate jurisdiction, namely, *United States* v. *First National Bank of Chicago*, 138 F. (2d) 681, decided by the Seventh Circuit, and *Ladd & Tilton Bank* v. *United States*, 30 F. (2d) 334, decided by the Ninth Circuit.

4. The United States Court of Appeals for the District of Columbia has decided a question of general importance contrary to established federal law in that it wholly ignores the doctrine of equitable estoppel and laches, the negligence of the Government and the innocence of petitioner.

Wherefore your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Court of Appeals for the District of Columbia, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 8562,

National Metropolitan Bank, appellant, v. *United States of America, appellee,* and that your petitioner may have such other and further relief in the premises as to this Court may seem meet and just.

GEORGE C. GERTMAN,
American Security Building,
Washington, D. C.

Attorney for Petitioner.

IN THE

Supreme Court of the United States

October Term, 1944

No.....

NATIONAL METROPOLITAN BANK, a corporation,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

1. The position of the United States in this case is identical with its position in *United States* v. *Chase National Bank*, 252 U. S. 485. There the Government attempted to throw its loss, incurred through the issuance of a single false and fraudulent Treasury check, on the Chase Bank because that bank turned the check in at the Treasury bearing a false payee's endorsement which it impliedly warranted as genuine; the Government's theory being that the Chase Bank got no title to the check owing to the forged endorsement, gave no consideration for the payment and breached its warranty. Here, the same thing is attempted

regarding loss on 144 false checks. In the Chase Bank case the facts are identical with the facts in the present case in the following respects:

The check was false and fraudulent and it had no rightful owner to whom liability on it remained, though upon its face it was normal and carried the Government's affirmation that it was genuine and legitimate.

The check was given full faith and credit by the Chase Bank and the Treasurer of the United States.

The payment liquidated the Government's obligation which the check created.

The forger of the endorsement had free access to blank Government checks, thus the Government made available to him the means with which to invite and facilitate the forgery. Crime and forgery antedated the forgery of the ostensible payee's name.

The same Government clerk who wrote the check forged the payee's endorsement and cashed it.

The check itself being false, the forged endorsement and consequent loss was therefore inevitable.

The check was not restrictively endorsed by the Chase Bank. The check found its way into the hands of an innocent collecting bank bearing forged endorsement of the ostensible payee.

The innocent intermediate or collecting bank impliedly warranted the genuineness of the false endorsement; here it expressly did this.

The innocent collecting bank got no title to the check *except through estoppel.*

Nobody had a better title to the check than the innocent collecting bank.

The Government did not have to pay the check twice.

The intermediate bank collected the check and paid out the proceeds in ignorance of its invalidity and the forged endorsement. It was not enriched in any way.

Deciding the issue, which was: On whose side did equity lie, the Government's or the bank's, this Court held: "In order to recover, plaintiff must show that the defendant cannot retain the money with good conscience. Both are innocent of intentional fault. He cannot be called upon to pay again, and the collecting bank has not received the proceeds of an instrument to which another had a better title. The equities of the drawee who has paid are not superior to those of the innocent collecting bank."

And in *United States* v. *First National Bank of Chicago*, 138 F. (2d) 681, it appeared that the United States, owing to its "culpable" negligence, issued 22 checks to the order of persons who were dead. Bearing forged endorsements of the names of the dead payees, the checks reached the hands of the First National Bank of Chicago for collection —though they were not so restrictively endorsed,—for the accounts of the forwarding banks which had cashed them for the forger. The Government's action against the collecting bank was based upon its "express warranty" of the genuineness of the forged endorsements. It was shown that the bank, upon collecting the checks, credited the proceeds to the various forwarding banks, that it was not benefitted in any way and that it was free of negligence. In affirming the judgment of the District Court, the Circuit Court of Appeals unanimously held: "Equitable consideration also dictate that judgment in this case should be for the defendant. Defendant was in no way benefitted by collecting these checks. It retained no part of the proceeds collected from the plaintiff." The Government "having set in motion the machinery which resulted in the loss, it may not now recover from the defendant thereon."

(Cf. also the recent case of *County of Oneida* v. *First*

Citizens Bank, 35 N. Y. Supp. (2d) 785, where the Appellate Division of the Supreme Court of New York said: "There is no suggestion in the papers that the defendant enriched itself in any degree by cashing the warrants in suit.")

Instead of following these two applicable federal decisions, supra, the United States Court of Appeals for the District of Columbia relied on *Clearfield Trust Co.* v. *United States*, 318 U. S. 363-8, and *Washington Loan & Trust Co.* v. *United States*, 77 U. S. App. D. C. 284, 134 F. (2d) 59, as precedents for the proposition and ruling that when petitioner—

> "* * * presented the [false and fraudulent] checks for payment with a warranty, express or implied, that the endorsements were in all respects regular, it thereby made itself liable to the drawer or drawee if it afterwards was shown that they were forged." (R. 32)

But the Clearfield Trust Company case did not concern a false and fradulent Government check. That case does not fit this case because there the check was *genuine* and valid and was issued conformably to statutory law in payment of a legitimate obligation, it had a rightful owner to whom liability remained and who could lawfully endorse, it was abstracted from the mail without any fault of the Government, and there was no negligence on the part of the Government. Consequently all the equities were on the Government's side. And, furthermore, the decision in the Clearfield Trust Company case was entirely consonant with what this Court held in the Chase Bank case, ante, namely: "If the draft had been a valid instrument with good title thereto in some other than the collecting bank, nothing else appearing, the drawee might recover as for money paid by mistake."

And also wholly inapplicable to the facts and defenses in this case is *Washington Loan & Trust Company* v. *United States*, 77 U. S. App. D. C. 284, 134 F. (2d) 59, though it involved forged endorsements of false Government checks. But in that case the Trust Company could not effectively plead equitable estoppel because it had dealt with the forger by cashing for him over 700 of the checks and therefore it was guilty of negligence contributing to the success of the forgeries. Unlike here, the Trust Company's position was not changed in reliance upon payment because it kept the money it collected from the Government. Unlike here, the Trust Company was put in no worse position after returning the money to the Government than if the Government had originally refused to pay the checks. Unlike here, the Trust Company was enriched through collecting the checks because if the Government had not paid them it would have been out of pocket the money it had paid the forger. Unlike here, the Trust Company acted for itself as owner and not for the convenience of another bank.

And there is nothing in *United States* v. *National Exchange Bank of Providence*, 214 U. S. 302, which militates against petitioner's position because the litigation in that case, unlike here, was against the bank that cashed the checks for the forger. In this respect that case is identical with *Washington Loan & Trust Co.* v. *United States*, *supra*. The Providence Bank having dealt with the forger, there were no equities on its side like the ones on the side of the Chase Bank. (It is noteworthy that Justice White who wrote the Providence Bank decision, was Chief Justice of this Court at the time the Chase Bank case was decided.)

The drawee's right to recover money paid on a *genuine* check bearing a forged payee's endorsement, warranted as genuine, is not absolute. The right to recover depends upon the facts and circumstances of each case, and equitable estoppel and laches pervade the right. District of Columbia Code (1940), Vol. 2, s.28-124; *Clearfield Trust*

Co. v. *United States*, 318 U. S. 363; *Ladd & Tilton Bank* v. *United States*, 30 F. (2d) 334, at p.337; *United States* v. *Guaranty Trust Co.*, 293 U. S. 340; *United States* v. *First National Bank of Chicago*, 138 F. (2d) 681; Keener on Quasi Contracts (1893), p.67. *State Planters Bank & Trust Co.* v. *Fifth-Third Union Trust Co.*, 56 Ohio App. 309, 10 N. E. (2d) 935. *Cf. Holly* v. *Missionary Society*, 180 U. S. 284; *Eliason* v. *Wilborn*, 281 U. S. 457, at p.461.

2. Equitable Estoppel, according to Professor Pomeroy, rests upon the principle: "When one of two innocent persons—that is, persons each guiltless of an intentional, moral wrong—must suffer a loss, it must be borne by that one of them who by his conduct—acts or omissions—has rendered the injury possible." Pomeroy's Equity Jurisprudence (1905), Vol. 2, s.804, p.1421.

Measured by Professor Pomeroy's definition, it cannot be controverted that the acts and omissions of the Government rendered the loss possible when, through culpable negligence, it permitted 144 fictitious checks to masquerade in commercial channels as its genuine checks, each thereby winning the faith and credit of an unsuspecting public. *Cf. Leather Mfgrs. Bank* v. *Morgan*, 117 U. S. 96. Also *Central National Bank* v. *National Metropolitan Bank*, 31 App. D. C. 391.

3. Regarding the third question presented, namely, laches, it cannot be successfully controverted that the Government's unexplained delay in filing suit was prejudicial to petitioner since the delay has deprived petitioner of an effective remedy over, in case of recovery, against The Anacostia Bank owing to the statute of limitations running in favor of that bank on each check as it received the proceeds. *Leather Mfgrs. Bank* v. *Merchants Bank*, 128 U. S. 26; *Philadelphia National Bank* v. *Fulton National Bank*, 25 F. (2d) 995; D. C. Code, (1940), Vol. 2, s.28-201; *United States* v. *Bank of America*, 47 Supp. 279, 281. In *Ladd & Tilton Bank* v. *United States*, 30 F. (2d) 334, the Ninth Circuit Court of Appeals, at p.337, said: "It

would be a harsh rule and wholly devoid of equity and good conscience which would provide that one paying a forged instrument, after discovering the forgery, might nevertheless complacently rely on an implied warranty for the full period of the statute of limitations and then recover from one who also innocently relied on the validity of the endorsement, and who, *by delay in the bringing of the action* or giving notice, has lost all means of protecting himself from those primarily liable. As the statute of limitations does not run against the Government, its delay could be indefinite. Such a rule ought not to be and is not the law." (Italics supplied)

In *Clearfield Trust Co.* v. *United States*, *ante*, this Court held that lack of prompt notice of the forgery would be a defense in an action against a collecting bank if the latter showed that delay caused him damage. The Court found no such damage in the case before it since the collecting bank, so far as appeared, could still recover from the prior endorser. In contrast, the Government here, by delaying its suit until after the statute had run against petitioner, has damaged petitioner by completely cutting off its right of recovery against a responsible prior endorser, The Anacostia Bank. If petitioner is not required to bear a loss flowing from lack of prompt notice, the giving of which is not a condition precedent to suit (*Leather Mfgrs. Bank* v. *Merchants Bank*, 128 U. S. 26, *United States* v. *National Exchange Bank of Providence*, 214 U. S. 302) a fortiori, it is required to bear a loss flowing from lack of prompt suit.

Nor can it be argued that petitioner should have paid the Government's demand in December 1938 and proceeded against The Anacostia Bank. Had it done so it would have run the risk of being denied recovery against The Anacostia Bank—as was the case in *Central National Bank* v. *National Metropolitan Bank*, 31 App. D. C. 391—on the ground that the Government was not entitled to restitution

since petitioner had only such right against The Anacostia Bank as the Government had against it. "It is true that [the drawer] was not a party to the action, but the plaintiff, [drawee] having recognized his right to the return of the money, * * * has taken his place, and is bound by whatever would bind him had it refused his demand for repayment and the action had been by him against it to recover money paid under a forged endorsement of his check." Again: "* * * there is no cause of action unless the payment of the check was not, as against the drawer, a good payment." *Central National Bank* v. *National Metropolitan Bank*, 31 App. D. C., at p.396. *Cf. National Bank* v. *Seattle National Bank*, 109 Wash. 312, 187 P. 342.

4. Petitioner has limited this brief primarily to a discussion of the conflict between the decision of the United States Court of Appeals for the District of Columbia and the decisions of this Court and Courts of coordinate jurisdiction. There is, however, attached hereto an appendix containing a general discussion of the case and the law applicable thereto for the information of the Court.

Respectfully submitted,

GEORGE C. GERTMAN,
American Security Building
Attorney for Petitioner.

APPENDIX

1. Because public funds cannot be expended except in compliance with law, U. S. C. A., Vol. 31, s.492, checks of the Government backed by the integrity of the United States circulate virtually on the basis of currency. They inherently carry the Government's affirmation of their verity, i. e. that they are in all respects what they purport to be—checks issued the payees in payment of the antecedent obligations stated on their face—and will be paid upon presentment at the Treasury. "It is the settled general law that all necessary prerequisites to the validity of official action are presumed to have been complied with." *Lewis* v. *United States*, 279 U. S. at p.73. Petitioner relied upon this presumption and upon nothing else when it handled these checks.

The only risk that attends a normal *genuine* check of the United States is the chance of its being lost, stolen or abstracted from the mail and falling into a forger's hands. Such was the case in *Clearfield Trust Co.* v. *United States*, 318 U. S. 363. Consequently the burden which banks assume is negligible when the checks have a true and legitimate status. But the checks involved in this case have no such status and their forgery was therefore inevitable as a check fraudulently obtained will be fraudulently used. The fact that the checks were not willfully issued is immaterial. *Continental National Bank* v. *National Bank of Commonwealth*, 50 N. Y. 575, at p.583; *Leather Mfrs. Bank* v. *Morgan*, 117 U. S. 96.

According to the facts in this case the Government so conducted its business that crime and injury would necessarily follow in its wake. A system had been installed in the Paymaster's office to prevent the very loss that happened. The wrongdoing of Foley was accomplished not by the working of the system but by the failure of the Government to observe its requirements. *Cf. International*

Finance Corp. v. *Peoples Bank*, 27 F. (2d) 523 affirmed in 30 F. (2d) 46; *Erickson* v. *Iowa National Bank*, 211 Iowa 495, 230 N. W. 342.

2. This action was brought by the United States to recover money allegedly paid the defendant under mistake of fact (R. 1). Payment grew out of the Government's redemption of 144 checks which it had issued and affirmed as *genuine* and valid but which turned out to be false and fraudulent. Being an action for "money had and received," it is ruled by equitable principles and "the claimant to prevail must show that the money was received in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it." *Atlantic Coast Line* v. *Florida*, 295 U. S. 301, at p.309. And, "since in this type of action, the plaintiff must recover by virtue of a right measured by equitable standards, it follows that it is open to the defendant to show any state of facts which, according to those standards, would deny the right." *Stone* v. *White*, 301 U. S. 532, at p.535. These principles are inculcated in the decision of this Court in *United States* v. *Chase National Bank*, 252 U. S. 485, which, was an action to recover money paid to an innocent collecting bank that had "impliedly" warranted the genuineness of a forged payee's endorsement upon a false and fraudulent Government check. There, at p.495, the Court said: "In order to recover plaintiff must show that the defendant cannot retain the money with good conscience." The same principle was very recently applied by the Seventh Circuit in *United States* v. *First National Bank of Chicago*, 138 F. (2d) 681, which was an action by the United States against the bank upon its "express" warranty of the genuineness of forged payees' endorsements on 22 Government checks payable to the order of dead people and negligently issued. There, at p.686, the Court said: "Equitable considerations also dictate that judgment in this case should be for the defendant. Defendant was in

no way benefitted by cashing these checks. It retained no part of the proceeds collected from the plaintiff."

In this case the Government, though also predicating a right of recovery (see second count, R. 2) on an "express" warranty of the genuineness of the forged payees' endorsements (R. 2), is relegated for recovery, if at all, under the first count (R. 1) "for money had and received" because this Court ruled in *United States* v. *Guaranty Trust Co.*, 293 U. S. 340, at p.369, that "the express guarantee of prior endorsements means no more than what is implied by every unrestricted endorsement, namely, that the endorsements were effective to give to the holder a legal title and right to enforce payment of the check."

3. It is undoubtedly the settled federal law that the United States, *in the absence of equitable estoppel and laches*, may recover back money it paid to redeem its own *genuine or legitimate checks* which are turned in at the Treasury bearing forged payees' endorsements, regardless of the good faith and innocence of the collecting bank. *Clearfield Trust Co.* v. *United States*, 318 U. S. 363. This is supported on the ground that the drawee remains liable to the true owner on the genuine checks or for conversion. Harvard Law Rev., Vol. 51, p.304. In such case, unless recovery is allowed, the United States would pay twice.

It is also the established law in the District of Columbia that the United States may recover back money it paid to redeem its own false and fraudulent checks which are turned in at the Treasury bearing forged payees' endorsements, warranted as genuine, where it appeared that the bank which turned in the checks *cashed them for the forger*. *Washington Loan & Trust Co.* v. *United States*, 77 U. S. App. D. C. 284, 134 F. (2d) 59. This is supported on the ground, *inter alia*, that owing to the bank's own negligence in dealing with the forger and cashing the checks for him, it contributed to the success of his forgeries and is there-

fore not in a position to set up equitable estoppel or laches against the United States.

But it is undoubtedly equally established federal law that the United States *may not* recover back money it paid to redeem its own false and fraudulent checks, turned in at the Treasury bearing forged payees' endorsements warranted as genuine, where the bank which turned them in did not deal with the forger, acted as an innocent collecting agency for another, was free of negligence attributable to the success of the forgery, was not benefitted in any way, *and none had a better legal title than the innocent collecting bank.* *United States* v. *Chase National Bank*, 252 U. S. 485; *United States* v. *First National Bank of Chicago*, 138 F. (2d) 581. This is supported on the ground, *inter alia*, that the collecting bank has not received the proceeds of a check to which another held a better title, the falsity of the checks equitably estops the Government from setting up the forgeries, the equities of the United States are not superior to those of the innocent collecting bank, and the bank was not enriched.

Here the Government admits that the checks were false and deceptive, issued in contravention of statutory law, incapable of true endorsement, carried the Government's affirmation that they were in all respects what they purported to be, and that petitioner was innocent throughout, free of negligence attributable to the success of the forgeries, and was not benefitted in any way.

Judge Lowell, the District Judge who wrote the decision in the Providence Bank case, *supra*, reported in 141 F. 209, (affirmed in 214 U. S. 302), correctly stated the federal rule applicable to recovery of money paid on *genuine* checks bearing forged endorsements, when he said: "One who has paid money to another upon a check bearing a forged endorsement may ordinarily recover back the money paid, even though the other be an innocent holder of the check

for value. As a general proposition, this is not disputed. *But recovery cannot be had where it would be inequitable* * * *." Continuing, the Judge said: "Payment by mistake is the basis of plaintiff's recovery. The right based on mistake is effective *unless the plaintiff is estopped to assert it.*" (Italics supplied) *Cf. United States* v. *National Rockland Bank*, 35 F. Supp. 912.

4. Equitable estoppel has never failed a defendant as a defense in this Court in kindred cases. Indeed it is a fact that throughout its history this Court has never imposed liability upon a bank which was free of negligence and had innocently collected and remitted money on spurious or raised Government checks. *Cooke & Co.* v. *United States*, 91 U. S. 389, involved spurious commercial paper of the United States. Mr. Justice Clifford, in dissenting, said: "I am of the opinion that the United States is not liable for its paper promises fraudulently or surreptitiously put into circulation even if the fraudulent act was perpetrated by Treasury officers." But in deciding the case, this Court said: "In this department the Secretary of the Treasury represents the Government. His acts and his omissions, within the line of his official duties, are the acts and omissions of the Government itself; and in all commercial transactions his official neglect will be deemed to be the neglect of the Government." Continuing: "Generally, in respect to all the commercial business of the Government, if an officer specially charged with the performance of any duty and authorized to represent the Government in that behalf, neglects that duty, and loss ensues, the Government must bear the consequences of his neglect. * * * As the Government can only act through its officers it may select for its work whomsoever it will; but it must have some representative authorized to act in all the emergencies of its commercial transactions. If it fails in this, it fails in the performance of its own duties, and must be charged

with the consequences that follow such omissions in the commercial world."

The case of *United States* v. *National Exchange Bank of Baltimore*, 1 F. (2d) 888 (affirmed 270 U. S. 527—ex-President Taft was then Chief Justice), involved a Government check which had been raised from $47.50 to $4750.00. There, there was no negligence attributable to the United States. Yet in the course of his decision Circuit Judge Rose said: "* * * The plaintiff having been both drawer and drawee of the check, may not, in the absence of special circumstances not here existing, recover back the money it has paid to a holder for value not chargeable with neglect or bad faith." Citing *Bank of United States* v. *Bank of Georgia*, 10 Wheat. 333. Continuing: "It is nothing to the point that one who pays his *genuine* check, upon which there has been forged the endorsement of a payee or of some intermediate holder in due course, may, *in the absence of negligence or estoppel*, compel repayment by him to whom paid no matter how innocent of carelessness or wrongdoing the recipient may have been." (Italics supplied)

The federal rule announced by Judge Lowell, *ante*, is incorporated in the District of Columbia Code (1940), Vol. 2, s. 28-201. It provides that no *title* can be acquired through a forgery "unless the party against whom it is sought to enforce such right is precluded from setting up the forgery." The effect of this statute is that a forged endorsement "is operative" against a party who "is precluded from asserting the forgery." This effect was given the statute by this Court in *United States* v. *Guaranty Trust Co.*, 293 U. S. 340, 349. *See Public Bank of New York* v. *Burchard*, 135 Minn. 171, 160 N. W. 667. *United States* v. *Citizens Union National Bank*, 40 F. Supp. 609, 610. *United States* v. *National Exchange Bank*, 45 F. 163. *Wells Fargo & Co.* v. *United States*, 45 F. 337.

If the checks had been genuine in their origin, the Government's remedy would rest on District of Columbia Code

(1940), Vol. 2, s.28-124, and the common law action of assumpsit for "money had and received." *State Planters Bank & Trust Co.* v. *Fifth-Third Union Trust Co.*, 56 Ohio App. 309, 10 N. E. (2d) 935.